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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 06-14750
Non-Argument Calendar

[FILED APRIL 4, 2007]

BIA No. A79-664-943

ROSALINE KENNEDY,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the
Board of Immigration Appeals

Before TJOFLAT, HULL and FAY, Circuit Judges.

PER CURIAM:

An Immigration Judge ("IJ") ordered Rosaline Kennedy removed in absentia after she failed to appear for her removal hearing. After two unsuccessful attempts to reopen her removal proceedings and the IJ's denial of her motion to reconsider the second motion to reopen, Kennedy appealed the IJ's order denying reconsideration to the Board of Immigration Appeals ("BIA"). The

BIA affirmed the IJ's denial of Kennedy's motion to reopen and rescind the in absentia order, refusing to consider Kennedy's exceptional circumstances claim because none of Kennedy's motions were filed within the 180-day statutory period. Kennedy petitions for review of the BIA's order, urging us to adopt a doctrine of equitable tolling of the 180-day period in which to file a motion to reopen in absentia removal proceedings based on exceptional circumstances, and arguing that equitable tolling was warranted in her case because she did not receive notice of her hearing or file a timely motion to reopen due to ineffective assistance of counsel. For the reasons set forth more fully below, we deny the petition.

We review the denial of a motion to reopen for abuse of discretion.[1] Anin v. Reno, 188 F.3d 1273, 1276 (11th Cir. 1999). An order of removal, entered in absentia, may be rescinded only

(I) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or

(ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive

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[1] Procedurally, Kennedy's appeal to the BIA was from the IJ's denial of her motion to reconsider her motion to reopen the in absentia removal order. However, the BIA stated that Kennedy was appealing the IJ's denial of her motion to reopen and rescind. We likewise review the denial of a motion for reconsideration for abuse of discretion. Assa'ad v. U.S. Att'y Gen., 332 F.3d 1321, 1341 (11th Cir. 2003).

notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State custody and the failure to appear was through no fault of the alien.

8 U.S.C. § 1229a(b)(5)(C), INA § 240(b)(5)(C); see also 8 C.F.R. § 1003.23(b)(4)(ii) (same).

In Anin, "[w]e held that the 180-day time limitation for motions to reopen filed pursuant to former INA § 242B(c)(3)(A), 8 U.S.C. § 1252b(c)(3)(A) (repealed 1996), for in absentia deportation orders could not be equitably tolled on account of ineffective assistance of counsel."[2] Abdi v. U.S. Att'y Gen., 430 F.3d 1148, 1149-50 (11th Cir. 2005). We determined that this provision was "jurisdictional and mandatory." Anin, 188 F.3d at 1278. We applied this reasoning in Anin to a

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[2] The statute we considered in Anin stated:

(3) Rescission of order.

Such an order may be rescinded only—

(A) upon motion to reopen filed within 180 days after the date of the order of deportation if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (f)(2) of this section), or

(B) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with subsection (a)(2) of this section or the alien demonstrates that the alien was in Federal or State custody and did not appear through no fault of the alien.

Anin, 188 F.3d at 1276 n.4.

motion to reopen under 8 U.S.C. § 1229a(c)(7), INA § 240(c)(7)[3] on the ground of ineffective assistance, which was filed after the expiration of the 90-day deadline for filing such a motion. Abdi, 430 F.3d at 1149-50. Although we recognized that the 90-day period may be subject to equitable tolling in very limited circumstances, id. at 1149, we held that ineffectiveness of counsel did not qualify. We said in Anin that this 90-day filing period "is mandatory and jurisdictional, and, therefore, it is not subject to equitable tolling. We say this because our reasoning in Anin is not specific to in absentia orders." Id. at 1150. Accordingly, we held that the BIA did not abuse its discretion in denying the motion to reopen. Id.

Under Anin and Abdi, we do not recognize equitable tolling based upon alleged ineffectiveness

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[3] This provision permits the filing of a motion to reopen, which "shall state the new facts that will be proven at a hearing to be held if the motion is granted, and shall be supported by affidavits or other evidentiary material." 8 U.S.C. § 1229a(c)(7)(A), (B), INA § 240(c)(7)(A), (B). "A motion to reopen proceedings shall not be granted unless it appears to the [BIA] that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing." 8 C.F.R. § 1003.2(c)(1).

of counsel and we hold that the BIA did not abuse its discretion in declining to consider Kennedy's exceptional circumstances claim because she did not file a motion to reopen within the 180-day filing period. In light of the foregoing, the petition for review is

DENIED.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church. Virginia 22041

Monge, Jose F., Esquire
339 W Butler Street
Lexington, SC 29072-2605

Office of the District Counsel/ATL
77 Forsyth St., Room 385
Atlanta, GA 30303

Name: ROSALINE KENNEDY **A79-664-943**

Date of this notice: 08/09/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/Donna Carr
Donna Carr
Acting Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

[FILED AUGUST 9, 2006]

File: A79 664 943 – Atlanta

Date: August 9, 2006

In re: ROSALINE KENNEDY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Jose F. Monge, Esquire

APPLICATION: Reopening

ORDER:

PER CURIAM. The respondent appeals from an Immigration Judge's decision denying her motion to reopen and rescind an in absentia order that was entered on Marchl6, 2004. The Immigration Judge's decision denying reopening is affirmed. The record supports the Immigration Judge's finding that notice of the hearing was provided in a manner that was reasonably calculated to reach the respondent. *Dominguez v. U.S. Attorney General*, 284 F.3d 1258 (11th Cir. 2002). As the respondent points out in her

appeal brief, the court sent the hearing notice to the same post office box where the Notice to Appear was successfully received by the respondent the month before the hearing notice was mailed (Brief at 2-3). Further, she concedes in her brief that she was continuing to use the same the post office address for her mail at the time when the hearing notice was sent. Therefore, even assuming, arguendo, that she was not also obligated to inform the court of the change in where she was physically residing, it is undisputed that the notice was sent to the address that she last provided to the court, and that this was the address that she maintains she continued to use and that she wanted to be used for mail delivery at the relevant time. We will not consider her exceptional circumstances claim because not one of her three motions was filed within the 180-day statutory period. *Anin* v. *Reno,* 188 F.3d 1273, 1278 (11th Cir. 1999) (time period in statute for motions to reopen in absentia proceedings is jurisdictional and mandatory). The appeal is dismissed.

/s/ Roger Pauley
FOR THE BOARD

UNTIED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
United States Immigration Court
77 Forsyth Street, Room 112
Atlanta, Georgia 30303

IN THE MATTER OF	)	
	)	
Rosaline KENNEDY	)	File No. A79 664 943
	)	
Respondent	)	

IN REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act (INA or Act), as amended, in that, at after admission as a nonimmigrant under section 101(a)(15) of the Act, you remained in the United States for a period longer than permitted.

APPLICATION: Motion to Reconsider/Motion to Stay

APPEARANCES

ON BEHALF OF RESPONDENT:
Rachael Effron, Esq.
3350 Peachtree Road, Suite 1600
Atlanta, Georgia 30326

ON BEHALF OF THE DHS:
Assistant Chief Counsel
77 Forsyth Street, Room 365
Atlanta, Georgia 30303

ORDER

On March 16, 2004, the Respondent failed to appear for her hearing and was ordered removed in absentia to Brazil. On July 19, 2005, a motion to reopen was filed on behalf of the Respondent. The motion was denied by the Court on July 22, 2005.

On August 31, 2005, a second motion to reopen was filed. On September 13, 2005, the Respondent's second motion to reopen was amended with supplemental documentation. This motion was denied on September 22, 2005.

On October 24, 2005, Respondent, through counsel, filed a motion to reconsider and a motion to stay. This motion now includes evidence that a bar complaint has been filed against the Respondent's prior attorney. The Respondent married an United States citizen on February 12, 2004. The Respondent claims to have an approved I-130 as of July 22, 2005, however, has not demonstrated any proof of the approved petition.

The government has not joined this motion.

This motion will be denied.

A motion to reconsider shall state the reasons for the motion by specifying the errors of fact or law in the

Immigration Judge's prior decision and shall be supported by affidavits and other evidentiary material. However, the Respondent's motion does not cite any errors of fact or law in the prior two decisions.

In the first denial of the Respondent's motion to reopen, the court found that the Respondent was chargeable as having received notice of hearing pursuant to United States v. Dominguez, 28 F.3d 1258 (11th Cir. 2002) and that the motion to reopen was untimely. 8 C.F.R. §3.23 (b)(4)(iii)(l).(The motion was not filed within 180 days of entry of an *in absentia* order of removal.)

The second motion to reopen was denied because a previous motion to reopen had been filed, 8 C.F.R.§3.23(b)(4)(ii); it was not joined by the government, and the Respondent failed to comply with the requirements of Matter of Lozado, 19 I&N Dec. 637 (BIA 1988). In Gbya v. United States Attorney General. 2003 WL 21961804 (11th Cir. August 19, 2003), the Eleventh Circuit affirmed the Board of Immigration Appeals, finding that the Board "does not abuse its discretion by filtering ineffective assistance of counsel claims through the screening requirements of Lozado" and the petitioner did not comply with those requirements.

While the Ninth Circuit held that an equitable tolling of the one motion rule may be proper in cases of ineffective assistance of counsel is alleged, the Eleventh Circuit provides no such guidance. See Rodriquez-Lariz v. INS, 282 F.3d 121 (9th Cir. 2002). Herein , the Respondent acknowledged service of the

Notice to Appear (NTA), as previously noted by the court in the first denial. A Respondent, who acknowledged receipt of the Notice to Appear (NTA), bears the responsibility of notifying the court of any change of address. The reverse side of the NTA clearly states the following:

> **Failure to appear:** You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Counsel, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

The court therefore, finds that equitable tolling is not applicable. Furthermore, the affidavit submitted from prior counsel does not state that he informed the Respondent not to advise the Government or the Court of any change of address. While it is acknowledged that prior counsel did not file an EOIR 28 until the first motion to reopen was filed, the filing

of an EOIR 28, notice of representation, by the attorney, does not relieve Respondent of her obligation to notify the court and the INS of any change of address. These issues were addressed and considered in the prior motions to reopen.

The second motion to reopen was filed and supplemented and thereafter denied. A motion to reconsider is limited to errors of fact or law. No errors have been cited. The Government has not joined this motion.

Accordingly, the following order will be entered:

ORDER

It is Ordered that:
The Respondent's motion to reopen/stay be DENIED.

It is further Ordered that:
The Respondent be REMOVED from the United States to Brazil pursuant to the order of this court dated March 16, 2004.

Date: 10/26/2005

/s/ William A. Cassidy
William A. Cassidy
United States Immigration Judge